Supreme Court, U.S.
FILED
JAN 26 2006
OFFICE OF THE CLERK

No. 05-259

In the Supreme Court of the United States

BURLINGTON NORTHERN & SANTA FE RAILWAY CO.,
Petitioner,

v.

SHEILA WHITE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

The International Municipal Lawyers Association (IMLA) is a nonprofit professional organization that serves as a resource for local government attorneys. IMLA is an advocate for the nation's local governments and provides its 1,400 members with information and advice on legal issues facing local governments.

Local governments are within the definition of employers subject to Title VII and its prohibitions on discrimination. 42 U.S.C. § 2000e(a), (b). There are nearly 87,900 local governments in the United States, including over 3,000 county governments, over 19,400 municipal governments, over 16,500 townships, over 13,500 school districts and over 35,100 special districts.[1] With more than 11.5 million full-time employees,[2] local governments account for 10.5% of

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* The parties' consent to amicus briefing is on file with the Clerk of this Court. In accordance with SUP. CT. R. 37.6, amici states that no counsel for either party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[1] *See* U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002 available at http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf.

[2] *See* U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003, available at http://ftp2.census.gov/govs/apes/03locus.txt.

full-time employment in the United States.[3] By contrast, state governments account for only 3.5% and the federal government for only 2.2% of full-time employment.[4]

The members of IMLA have an immediate interest in the standards set under Title VII to establish legally cognizable discrimination in employment. More specifically, the threshold standard for adverse employment actions must be clarified and applied uniformly across the United States. A statutory interpretation that protects employees from discrimination while recognizing that not every action taken by an employer may trigger a Title VII claim is necessary.

STATEMENT OF THE CASE

IMLA adopts the Statement of the Case set forth in the Brief of Petitioner.

SUMMARY OF ARGUMENT

It is well-settled that not every perceivable discriminatory wrong on the job is sufficient to state a claim under Title VII. A required element of an employment discrimination claim has always been a threshold showing of an adverse employment consequence. This case requires that the Supreme Court determine what the standard for adverse action in retaliatory discrimination cases should be in light of conflicting standards used in different federal circuits.

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[3] U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2005, available at http://www.bls.gov/iag/government.htm.

[4] *Id.*

In resolving this matter, the Court should hold that the standard for retaliatory discrimination under Title VII be the same as applied to discrimination claims based on race, sex, or other protected classifications. There is nothing in the text of the statute, or any other principled basis, that supports using a different standard for retaliation claims. The standard of "anything that is reasonably likely to deter employees from engaging in protected activity," suggested by the EEOC, should be flatly rejected. Instead, the Court should apply the tests for a "tangible employment action" or "hostile environment" that have evolved in Title VII jurisprudence. This will bring a consistency in standards across the federal circuits, while confirming the equal importance of the general and retaliatory discrimination provisions in the Act.

Moreover, the specific actions at issue in this case, a temporary suspension (reversed through an internal-review process) and a modification of job duties without a reduction of pay, do not rise to the level of a tangible employment action. Accordingly, the decision of the Sixth Circuit should be reversed. Its broad interpretation of Title VII will result in federal courts attempting to adjudicate the subjective preferences of employees when routine job actions are taken. Minor grievances and complaints should be resolved in other forums. For instance, local governments and other employers routinely provide such grievance and appeal procedures to their employees. Those are the places — rather than the federal courts — that should be available to employees with complaints about minor and ultimately non-tangible events, such as those present in this case.

ARGUMENT

A. The test for retaliatory discrimination under Title VII should be the same as applied to discrimination claims based on a protected classification.

Title VII of the Civil Rights Act of 1964, states, in part, that it is unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). The Act also contains a non-retaliation provision that forbids "an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). This Court has never held that the critical phrase — "discriminate against" — has a different meaning in the retaliation provision than it does in the general discrimination provision. The Sixth Circuit has correctly held that it does not. *White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789, 799 (6th Cir. 2005); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir. 2000); *Akers v. Alvey*, 338 F.3d 491, 498-99 (6th Cir. 2003). The parties argue over whether one of the two provisions is broader than the other. However, no basis exists to believe that Congress intended that the protection afforded employees after opposing discrimination or filing a charge be greater or less than protection from discrimination on the basis of race, sex, or other protected classification. Under such an interpretation, an employment action that is not a "tangible adverse action" under the general discrimination provision, could be actionable under the retaliatory discrimination provision. For

example, a job transfer might be found to be insufficient to state a race discrimination claim, but sufficiently adverse to state a retaliatory discrimination claim. Should this Court accept the view of the EEOC, that anomalous result is easy to foresee.

This Court should not accept the distinct standard espoused by the Equal Employment Opportunity Commission ("EEOC") for retaliation cases — "anything that is reasonably likely to deter employees from engaging in protected activity is actionable retaliation." EEOC Compliance Manual § 8-11.D.3. The position of the EEOC stated in its current Compliance Manual was not developed contemporaneously with the adoption of Title VII nor in response to the development of case law. The EEOC standard has been followed only by the Ninth Circuit. *Ray v. Henderson*, 217 F.3d 1233-34 (9th Cir. 2000). This Court previously has held the EEOC does not have authority to adopt substantive rules under Title VII. *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 207 (1997). Accordingly, the EEOC guidance is entitled to no deference under the doctrine of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The Compliance Manual is entitled to consideration by the courts only to the extent it has the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Here, it has no power to persuade at all.

For all these reasons, this Court should reject a standard for retaliatory discrimination claims that is different from the test used in cases involving discrimination based on race, sex and other protected classifications.

B. This Court has held that discriminatory conduct is actionable under Title VII only when it meets the test for "tangible employment action" or the test for "hostile work environment."

The basic elements of a so-called "disparate treatment" claim, whether brought under the general discrimination section of Title VII or the retaliatory discrimination provision, have always included an adverse employment consequence. *See* 1 B. Lindemann & P. Grossman, *Employment Discrimination Law 10-11* (3d ed. 1996). This Court, however, has distinguished claims based on economic or tangible discrimination and claims arising from a hostile or abusive environment that do not require proof of an adverse employment decision. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)and *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). In hostile environment cases, a plaintiff must prove that the workplace is permeated with "discriminatory intimidation, ridicule, and insult," *id.* at 65, that is "sufficiently severe or pervasive to alter the working conditions of the victim's employment and create an abusive working environment," *id.* at 67 (internal brackets and quotation marks omitted), to establish a violation of Title VII.

By contrast, discriminatory treatment that does not involve a hostile or abusive environment must be based on a "tangible employment action." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), (addressing the vicarious liability of employers for discriminatory conduct). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. 742, 761 (Citations, internal brackets and quotation

marks omitted.) "A tangible employment action in most cases inflicts a direct economic harm." *Id.* at 762.

In sum, whether a case is reviewed under the "tangible employment action" doctrine or the "hostile environment" framework, a threshold seriousness of consequence must be shown. This doctrinal requirement is consistent with precedent of this Court under Title VII. *See Harris*, 510 U.S. at 17, ("conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment is beyond Title VII's purview."); *see also Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80-82 (1998) (outlining limits to keep Title VII "from expanding into a general civility code.") *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (isolated incident of harassment that cannot be considered "extremely serious" is not a discriminatory change in conditions of employment). Using threshold standards for severity also honors the maxim *de minimus non curat lex* — "the law cares not for trifles."

C. This case does not involve tangible employment actions.

Because this case was not litigated on a theory of hostile environment, White needed to show that her temporary investigatory suspension and loss of forklift driving duties were tangible adverse employment actions. As discussed in Section A, above, there is no reasoned basis to apply a different test for adverse employment actions under the retaliation provision of Title VII than is used for discrimination based on race, sex or other protected classifications. While the various courts of appeals have labeled the standard for the adverse action element differently, the precedent of this Court illustrates that any claim under Title VII not based on a theory of hostile environment must meet the test for tangible employment

action. *See Ellerth*, 524 U.S. at 761; *see also Faragher*, 524 U.S. at 790. It bears repeating that:

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Ellerth, 524 U.S. at 761.

Even more helpful to defining the concept, this Court has stated that: "A tangible employment action in most cases inflicts *direct economic harm.*" *Id.* at 762 (emphasis added). In reaffirming the direct economic harm aspect of the tangible employment action standard in *Ellerth*, this Court noted its application by the lower courts. *Ellerth*, 524 U.S. at 761, *citing Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (transfer was not a materially adverse employment action); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994) (transfer creating a "bruised ego" was not a materially adverse employment action); *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 886-87 (6th Cir. 1996) (transfer with no loss of title, pay or benefits was not a materially adverse employment action); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (reassignment with fewer duties and more stress caused no "materially significant damage").

Since *Ellerth*, lower courts have continued to follow the tangible employment action standard in rejecting Title VII claims that do not include some level of direct economic harm. *Aquilino v. Univ. of Kan.*, 268 F.3d 930, 934 (10th Cir. 2001) (removal from special committee); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (reassignment to

an unfamiliar job with unfavorable working conditions); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239-40 (11th Cir. 2001) (changes in work duties); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000) (change in assignment).

Contrary to these cases applying the tangible action standard, the Sixth Circuit, in the present case, applied its own weak "materially adverse" standard and rejected the "ultimate employment decision" standard used by the Fifth and Eighth Circuits in retaliation cases. *White,* 364 F.3d 789, 801, *citing Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); and *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997). The standard used by the Fifth and Eighth Circuit is much more faithful to this Court's tangible employment action standard than the standard actually applied by the Sixth Circuit. The Sixth Circuit's decision is inconsistent with the tangible employment action standard.

1. The temporary suspension

In focusing on a 37-day suspension (reversed under the company's internal review procedure with back pay), the Sixth Circuit emphasized that White would be deprived of her opportunity to recover "interest on the back pay, attorney's fees, emotional suffering, and punitive damages" for her temporary suspension. *White*, 364 F.3d at 802. Compensatory and punitive damages have been available under Title VII only since the Civil Rights Act of 1991. 42 U.S.C. §§ 1981a(b)(3); § 2000e-5(g), (k). A claim about a temporary suspension that was rectified under an internal policy, with full back pay, could not have been made before then, because Title VII remedies were purely equitable. The rationale by the Sixth Circuit, however, misses the point. If claims may go forward simply because a jury might award

damages, then any material-harm threshold has been eliminated. Tests for "tangible," "material," or "ultimate" actions all become irrelevant. Plaintiffs under this approach are not restrained from pursuing damages, including up to $300,000 in compensatory and punitive damages, for adverse actions no matter how trivial or temporary, as long as they muster some evidence of improper motivation. Congress may have intended to increase the incentive for employees to sue when it amended the Title VII damages provisions through the Civil Rights Act of 1991, but there is no reason to think it also intended to sweep away the limitations established by this Court and others on what conduct is actionable.

A different result is dictated under a proper application of the tangible employment action standard. The only actual impact on White was a month-long *delay* in her being paid. While this may have been a personal inconvenience to her, it is just the sort of relatively small economic harm invariably difficult to measure that is part of living in society and should not be made a federal case. *Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993). Moreover, the tentative nature of her ultimately reversed suspension (with back pay) belies the tangible nature of that action. *Mattern*, 104 F.3d at 708. Courts have held that interim actions, such as a suspension that is ultimately reversed or a delayed demotion with back pay, are not adverse employment actions. *Bell v. Georgia-Pacific Corp.*, 390 F. Supp. 2d 1182, 1189 (M.D. Fla. 2005), *aff'd.*, 2005 U.S. App. LEXIS 24425 (11th Cir., November 10, 2005); *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000); *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998).

2. Change in job duties

The modification of job duties within an employee's classification, with no reduction in pay or benefits, is not a tangible adverse employment decision — even if the new assignment is "more arduous and dirtier." This case involved the duties of a standard track laborer job, and being the person on her crew to operate the forklift involved no additional pay for White. *White*, 364 F.3d at 803. Modification of job duties to perform other duties normally performed by regular track laborers with no economic harm simply fails to objectively establish a tangible harm. It certainly is possible that White had a preference for driving the forklift. But adjudicating the preferences of employees relating to particular job tasks within a job description is not the work of federal courts.

D. Reversal is necessary to ensure efficient operation of local governments.

This case illustrates the type of routine employment decisions that should not be viewed as tangible adverse actions sufficient to support Title VII claims. It is easy to see the potential difficulty local governments would have if the standard for tangible adverse action were diluted to the level set by the Sixth Circuit. Would every change in duties among firefighters at a particular fire station give potential rise to claims of tangible adverse actions? Likewise, police officers are commonly moved between assignments on a routine basis. In that context, would claims of "arduousness" be sufficient to satisfy the adverse action test? The flexible and ever changing duties of nurses in public hospitals and teachers in public schools present other examples where duties are regularly transferred between employees.

Numerous public positions involve varying duties, all more or less "desirable" depending on the personal preferences of the employee. Only a proper application of the tangible employment action standard will prevent complaints over such subjective employee preferences from supporting cognizable Title VII claims. The proper forums for complaints over intangible and inconsequential matters by public employees are afforded by public employers through civil service systems, in grievance and disciplinary appeals, and other personnel procedures. Even in this case, White's private employer provided procedures for the protection of employees, including a procedure that resulted in the reversal with back pay of her temporary suspension.

Title VII complaints should go forward in federal court only when the facts are serious enough to show a tangible employment decision or a hostile work environment. Permitting federal lawsuits in lesser circumstances will — just as in the private sector — result in overburdening local governments with employment litigation and adversely affect operational efficiency. This case presents an opportunity to avoid such harm to public and private employers alike.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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